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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WOODFIN SUITES HOTEL, LLC,

Plaintiff and Appellant,

v.

CITY OF EMERYVILLE,

Defendant and Respondent.

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A123106

(Alameda County Super. Ct. No. RG07357953)

Woodfin Suites Hotel, LLC (Woodfin) appeals contending the trial court erred when it denied its request for attorney fees under Code of Civil Procedure section 1021.5,[1] the private attorney general statute. We conclude the trial court did not abuse its discretion and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The City of Emeryville has four large hotels within its boundaries including a Woodfin Suites Hotel. On November 8, 2005, the citizens of Emeryville adopted Measure C, an initiative that regulates the terms and conditions of employment at the city's large hotels. The measure requires the hotels to pay their employees at least $9 per hour and requires that the average wage be at least $11 per hour. In addition, the measure

[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

requires the hotels to pay time and a half to any housekeeper who cleans more than 5,000 square feet per day, requires that employees be paid their salary while on jury duty, and requires any company that purchases a hotel to retain the current staff for at least 90 days. Measure C also includes two enforcement mechanisms. First, it requires each large hotel to obtain a special permit that can be acquired by showing that the hotel has complied with the conditions of Measure C. Second, it states that a private action to enforce the measure can be filed by the city, any resident, any hotel employee, or any organization operating within the city.

In February 2006, Woodfin filed an action in federal court seeking to invalidate Measure C arguing it was unconstitutional and preempted by federal law. Simultaneously, Woodfin sought a preliminary injunction to prohibit Emeryville from enforcing Measure C. The district court denied the request for a preliminary injunction ruling that Woodfin was unlikely to prevail on the merits. Subsequently, that case was dismissed without prejudice.

In August 2006, Emeryville began the Measure C permitting process by asking Woodfin and the other large hotels for information. While that process was ongoing, several of Woodfin's employees filed complaints with Emeryville alleging violations of Measure C.

In September 2006, Emeryville amended its master fee schedule to add an "enforcement fee" under Measure C. The enforcement fee imposed on each hotel all the costs associated with the city's efforts to determine whether it had complied with Measure C regardless of whether any violation was found.

That same month, several of Woodfin's employees filed a complaint in the Alameda County Superior Court. The complaint, entitled, *Magana v. Woodfin* (*Magana*), alleged Woodfin had violated Measure C.

In December 2006, Woodfin notified some of its employees that they would be terminated if they could not explain "no-match" letters from the federal Social Security Administration. Later that month, the trial court issued a temporary restraining order that precluded Woodfin from terminating any employees based on the "no match" letters.

On December 26, 2006, Emeryville adopted an urgency ordinance to codify Measure C. The ordinance also directed city employees to prepare complaint forms and to draft regulations within 90 days, and enjoined large hotels from terminating any employee who had filed a complaint.

In January 2007, Emeryville intervened in the *Magana* case. On January 26, 2007, the court issued a preliminary injunction that precluded Woodfin from dismissing any employees based on a "no match" letter.

On February 6, 2007, Emeryville adopted regulations to implement Measure C. As is relevant here, the regulations set forth requirements for complying with the measure, established procedures for a permit process, and created an administrative claims procedure for employees.

On April 9, 2007, Woodfin filed a second complaint in federal court challenging Measure C. That complaint was dismissed based on abstention principles.

In June 2007, Emeryville's city manager issued two decisions regarding Woodfin. The first adjudicated 17 employee complaints that had been filed and ordered Woodfin to pay back wages to each. The second granted Woodfin a Measure C permit conditioned on Woodfin's payment of back wages plus penalties and an unspecified "enforcement fee."

Woodfin appealed the city manager's decisions to the Emeryville city council. The city council scheduled a hearing for August 27, 2007.

On August 26, 2007, the day before the hearing, Emeryville issued revised wage orders and permit conditions. The proposals were supported by 18 binders of documents. Although the precise amount is unclear, Woodfin estimated that it was being required to pay over $304,000 in fees, fines, and penalties.

The next day at the appeal hearing, counsel for Woodfin was only given limited time to present his case. At the conclusion of the hearing, the city council voted unanimously to affirm the city manager's revised orders.

Woodfin then responded by filing the petition for writ of mandate that is at issue in the current appeal. It sought to invalidate Measure C and its associated ordinances and

regulations arguing they were unconstitutional on their face and as applied. Woodfin's petition was supported by amicus briefs from business organizations that argued Measure C was invalid and was bad public policy.

The trial court conducted a hearing on the petition and issued a lengthy decision granting it in part and denying it in part. As is relevant here, the court issued six rulings:

--Measure C was facially valid.

--The enforcement fee was invalid on due process grounds.

--The December 26, 2006 emergency ordinance was invalid because it was not adopted in response to a real emergency.

--The portion of the implementing regulations that authorized the city to create an administrative claims process was invalid because Measure C contains its own enforcement mechanism.

--The remainder of the implementing regulations were valid.

--The manner in which the city council conducted the appeal hearing violated Woodfin's due process rights because, among other things, Woodfin's counsel was not given enough time to present his case. All orders that were issued based on that hearing were therefore invalid.

Having achieved a partial victory, Woodfin filed a motion under section 1021.5 seeking to recover the attorney fees it spent opposing Measure C.

After conducting another hearing, the trial court denied Woodfin's request concluding it had not satisfied the requirements for an award of fees under section 1021.5.

Woodfin then filed the present appeal challenging the court's decision to deny its request for fees.

II. DISCUSSION

Woodfin contends the trial court erred when it denied its request for attorney fees under section 1021.5.[2]

Section 1021.5 codifies the "private attorney general" doctrine. (*Punsly v. Ho* (2003) 105 Cal.App.4th 102, 109.) The doctrine is "based on the theory that 'privately initiated lawsuits are often essential to the effectuation of the fundamental public [policies] embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.' [Citation.]" (*Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 663.) "Three basic criteria are required to support an award of attorneys' fees under section 1021.5: (1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit was conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement were such as to make the award appropriate." (*Ibid.*) Each of these criteria must be satisfied to justify an award of fees. (*Punsly v. Ho, supra,* 105 Cal.App.4th at p. 114.) The trial court is granted the discretion to determine whether an award of attorney fees under section 1021.5 is appropriate and its ruling will be reversed on appeal only where the court abused its discretion. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578; *Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143.)[3]

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[2] As is relevant here, section 1021.5 states: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

[3] Woodfin argues this court must decide de novo whether it is entitled to attorney fees. We address Woodfin's argument on this point later in this opinion.

While the parties have addressed the second and third factors at length in their briefs, we focus on the third factor: whether " 'the necessity and financial burden of private enforcement [were] such as to make [an] award appropriate.' " (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321, quoting § 1021.5.) This factor "focuses on the financial burdens and incentives involved in bringing the lawsuit." (34 Cal.3d at p. 321, fn. omitted.)

Two lines of authority have developed to analyze that factor. The first, which we will describe as the traditional method, focuses on whether the cost of the claimant's legal victory transcends his personal interest. Although sometimes phrased in different ways, these cases hold that an award of fees is justified when the financial burden placed on the party seeking fees is " 'out of proportion to his individual stake in the matter.' " (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941, quoting *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89.) This standard has been applied by our Supreme Court (*Baggett v. Gates*, *supra*, 32 Cal.3d at p. 143), and by the vast majority of appellate courts that have addressed the issue. (See, e.g., *Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 Cal.App.4th 1143, 1151; *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1098; *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 159; *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1517; *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1046-1047; *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 967; *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 599; *County of San Diego v. Lamb* (1998) 63 Cal.App.4th 845, 853; *City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100, 1113; *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 570; *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 691; *Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 172-173; *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 30; *Save Oxnard Shores v. California Coastal Com.* (1986) 179 Cal.App.3d 140, 154; *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113; *Marini v. Municipal Court* (1979) 99

Cal.App.3d 829. 836; see also Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2008) § 4.34, pp. 129-137 and cases cited therein.)

A second line of authority analyzes the financial burden factor in a different way. This line of authority is based on the decision in *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1 (*Los Angeles Police Protective League*), that holds a trial court evaluating the financial burden factor should go through a three-step process. First, the court should determine the monetary value of the gains actually achieved in the litigation. (*Id.* at p. 9.) Second, the court should discount the value of those gains by "some estimate of the probability of success at the time the vital litigation decisions were made[.]" (*Ibid.*) Thus, for example, if the plaintiff had only a one third chance of victory, the estimated value of the case would be only one-third of the actual recovery. (*Ibid.*) Third, the court should compare the discounted estimated value of the case with the actual costs of litigation. (*Id.* at p. 10.) An award of fees under this method is appropriate "except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs." (*Ibid.*) The method articulated in *Los Angeles Police Protective League* has been followed by a smaller number of reviewing courts. (See, e.g., *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1351-1354; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1414-1415, disapproved on other grounds in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1153, fn. 6.)

Here, Woodfin argued in the trial court that it was entitled to attorney fees under section 1021.5 because the legal costs it had incurred opposing Measure C were greater than the fines that Emeryville had sought to impose. Woodfin did not cite *Los Angeles Protective League* or any of the cases that follow it, and it did not ask the court to conduct the analysis that is set forth in those cases.

However, Woodfin has adopted a different strategy on appeal. It argues the trial court erred because it did not follow the method of analysis set forth in *Los Angeles Police Protective League* and its progeny.

We reject this argument first because Woodfin never *asked* the trial court to evaluate the financial burden factor using the *Los Angeles Police Protective League* analysis. Having failed to raise that issue in the court below, Woodfin has forfeited the right to raise it on appeal. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.)

We also reject the argument on the merits. Woodfin's argument is premised on the assumption that the *only* valid way to evaluate the financial burden factor is to use the *Los Angeles Police Protective League* analysis. That is simply not true. As we have noted, the vast majority of cases that have been decided in the preceding 30 years have evaluated the financial benefit factor using the traditional method: i.e. by determining whether the financial burden placed on the party seeking fees is " 'out of proportion to his individual stake in the matter.' " (*Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 941, quoting *County of Inyo v. City of Los Angeles*, *supra*, 78 Cal.App.3d at p. 89.) We are both unwilling, and unable (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), to overturn this extensive body of law. Rather, we conclude that the financial benefit factor may properly be evaluated using the traditional method.

In reaching this conclusion, we do not intend to cast any doubt on *Los Angeles Police Protective League* or the cases that follow it. We believe the method used in those cases is *a* valid way to evaluate the financial benefit factor. The method seems particularly well suited for determining whether a public interest plaintiff who has filed a class action suit and obtained a common fund recovery is entitled to fees. Indeed, one of the cases that follows *Los Angeles Police Protective League* applied the method in precisely that context.[4] However, it is simply *one* method for evaluating the financial

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[4] See *Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at page 1415, where the court stated as follows: "Thus, the following rule may be extrapolated from the *Los Angeles Police Protective League* opinion: If the estimated value of a class action common fund recovery, determined as of the time the vital litigation decisions were being made, does not exceed actual litigation costs by a substantial margin, the financial burden of private enforcement is such as to make it appropriate to award attorney fees under section

benefit factor. We believe the trial court has the discretion to determine which method is more appropriate and that its ruling will be reversed on appeal only where the court abused its discretion. (*Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at p. 578; *Baggett v. Gates*, *supra*, 32 Cal.3d at p. 143.)

Our conclusion on this point is supported by a well respected practice treatise. It describes the procedure set forth in *Los Angeles Police Protective League* as being "[o]ne method for determining whether the financial burden of litigation merits an award of fees . . . ." (Pearl, Cal. Attorney Fee Awards, *supra*, § 4.35, p. 137.) The fact that *Los Angeles Police Protective League* describes "one method" that can be used to evaluate the financial burden factor implies that another valid method exists.

Having concluded the court could properly evaluate the financial burden factor using the traditional method, we turn to whether the trial court in this case abused its discretion. We conclude the answer is no. As we have noted, Woodfin did not ask the court to use the *Los Angeles Police Protective League* method and this is not the type of dispute for which that method is particularly well suited. (Cf. *Beasley v. Wells Fargo Bank*, *supra*, 235 Cal.App.3d at p. 1415.) The court did not abuse its discretion when it decided to use the traditional method rather than the *Los Angeles Police Protective League* method.

Nor did the court abuse its discretion when applying the traditional method of analysis. The record in this case indicates Woodfin spent approximately $167,000 litigating the petition for writ of mandate that forms the basis for the present appeal. The trial court ruled that the financial burden was not out of proportion to Woodfin's individual stake in the matter. As the court explained: "Woodfin brought the case to avoid having to pay approximately $350,000. The case was brought primarily for Woodfin's pecuniary interest. [Citation.] . . . Although the case did serve a public purpose in the sense that any lawsuit that clarifies a statute or regulation serves a public

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1021.5. In contrast, if estimated value is substantially more than actual litigation costs, there should be no award under section 1021.5 unless public benefits are very significant."

purpose, 'the Legislature did not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitutional or statutory right.' [Citations.]"

The court's ruling on this point was reasonable and certainly did not constitute an abuse of discretion. Woodfin admitted in the trial court that it was seeking to avoid paying over $304,000 in fees, fines, and penalties that Emeryville had sought to impose. At least some of those fees were of an ongoing nature thus making the trial court's $350,000 estimate reasonable if not on the low side. Furthermore, Woodfin characterized mandates set forth in Measure C as being so onerous that they threatened the economic vitality of businesses that operate within Emeryville. Having taken the position that Measure C threatened its very economic viability, the trial court could reasonably conclude that the relatively modest amount Woodfin spent was not out of proportion to its individual stake in the matter. As another court stated aptly, "Section 1021.5's policy of encouraging public interest lawsuits is not promoted by awarding fees to persons having strong personal economic interests in litigating matters." (*Beach Colony II. v. California Coastal Com., supra,* 166 Cal.App.3d at p. 115.)[5]

None of the other arguments Woodfin makes convinces us the trial court erred when it denied its request for fees. First, Woodfin argues that it in fact spent over $500,000 opposing Measure C, therefore making its burden greater, and an award of fees more appropriate. However, the $500,000 amount Woodfin cites includes the entire amount Woodfin spent to oppose Measure C including the two unsuccessful federal lawsuits that it filed and the apparently ongoing *Magana* litigation. While a trial court deciding whether to award fees under section 1021.5 has the discretion to award fees for other closely related court proceedings (*Lindelli v. Town of San Anselmo, supra,* 139 Cal.App.4th 1499, 1517, fn. 15), nothing in the record here indicates the trial court abused its discretion. Indeed, absent an affirmative showing to the contrary we must

[5] Having concluded the trial court did not err when it found Woodfin had failed to satisfy the financial burden factor, we need not address Woodfin's arguments concerning whether it conferred a significant benefit on the general public or a large class of persons.

presume the court did not abuse its discretion. (*Mejia v. City of Los Angeles, supra,* 156 Cal.App.4th at p. 158.) Woodfin has made no such showing here.

Alternately, Woodfin argues whether an award of fees should have been awarded was a question of law that this court must decide de novo on appeal. The general rule is that the trial court has the discretion to determine whether an award of fees under section 1021.5 is appropriate and that the court's ruling will be affirmed on appeal unless the trial court abused its discretion. That is the rule applied by our Supreme Court (*Graham v. DaimlerChrysler Corp., supra*, 34 Cal.4th at p. 578; *Baggett v. Gates, supra,* 32 Cal.3d at pp. 142-143), and by the vast majority of appellate decisions. (See *Williams v. San Francisco Bd. of Permit Appeals, supra,* 74 Cal.App.4th at pp. 964-965 and cases cited therein.) While there are situations where an appellate court is as well positioned as the trial court to determine whether an award of fees is appropriate, such as when the award is based on the results achieved on appeal (see, e.g., *Lindelli v. Town of San Anselmo, supra,* 139 Cal.App.4th at p. 1516), this is not one of them.

We conclude the trial court did not abuse its discretion when it denied Woodfin's request for fees.

III. DISPOSITION

The attorney fee order is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.